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No. 1299

# In the Supreme Court of the United States

OCTOBER TERM, A.D. [redacted] 1968

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**AUGUST HOERDT**, as Trustee, et al.,

*Petitioners,*

vs.

**CITY OF EVANSTON**, a Municipal Corporation,

*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

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Petitioners, August Hoerdt, as trustee etc. et al. pray that a Writ of Certiorari issue to review a final judgment of the Appellate Court of Illinois, a Petition for a Rehearing having been filed in such Court and denied. Petition for leave to appeal to the Illinois Supreme Court was filed in the latter court and was denied on January 27, 1969; the order became final on that day.

## OPINION BELOW.

The opinion of the Illinois Appellate Court is appended hereto as Appendix I. It is reported in 99 Illinois Appellate Court Reports, Second, at page 307, and in 241 N.E. 2d 685.

## JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked under Section 1257(3) Title 28, U.S. Code, providing for review by this court by Writ of Certiorari of decisions of the highest court of a State where a right is specially set up and claimed under the United States Constitution.

## QUESTION PRESENTED.

The question presented is: Can An Apartment Building Owner Be Compelled To Use An Adjoining Vacant Lot He Later Acquires To Lessen The Non-Conformance, As To Zoning, Of His Apartment Building.

## U. S. CONSTITUTIONAL PROVISIONS INVOLVED.

Amendment XIV Section 1

> ". . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Amendment V

> "No person shall . . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

## STATEMENT OF THE CASE.

Plaintiffs, the trustees under a land trust which has owned, since February 1942, a 30-apartment building at the northwest corner of Central St. and Eastwood Ave., Evanston, Illinois, bought, on February 10, 1949, for the purpose of constructing a building adjoining their 30-apartment building (Abst. 22) the 20 foot vacant lot involved in this case; such lot is 20 feet by 155 feet in size and lies immediately west of and contiguous to said 30-apartment building; both parcels are zoned B-2 (Business) (Abst. 23) in the present code but in prior codes the zoning was commercial. The vacant lot is across the street from the Evanston Theatre and next to a large International Business Machine Co. building; the evidence shows the vacant lot is in grass and is used by the tenants in plaintiffs' 30-apartment building to the east to hang up laundry (Abst. 22), the evidence also shows there is ample off street parking available in the immediate neighborhood (Abst. 23) and that the properties have excellent transportation available, being on the Evanston bus line, one block from the Central St. Station of the North Western Railway, and three blocks from the Central St. elevated station (C.T.A.) (Abst. 23), the latter two providing direct transportation to Chicago's loop area.

On May 19, 1952, the City of Evanston passed its first off street parking ordinance applicable to the above two parcels (Abst. 25). It previously in 1941 had passed an off street parking ordinance but this did not apply to property zoned commercial (the instant property's zoning in 1941). The said 1952 ordinance required that 30-apartment buildings built thereafter provide some 24 off street (Abst. 25) parking places, thereby making plaintiffs' 30-apartment building a legal non-conforming use in respect to off street parking since it was built in 1928 and con-

tained only 6 garage spaces with no other provision for the parking of tenants' automobiles.

On February 15, 1963, plaintiffs applied to the City of Evanston for a permit to build a two story brick building on the vacant lot, such building to contain a store, an office and five apartments with five off street parking places (Abst. 26, Plaintiff's Ex. 6). The City rejected the request because the five off street parking places varied slightly anglewise from the requirement of the ordinance. An appeal was taken to the Zoning Board of Appeals which affirmed the decision of the City. (See Appendix II)

Thereafter a new plan (Plaintiffs' Ex. 7) calling for only four apartments with four off street parking places, two stores and one office, which PLAN CONFORMS IN ALL RESPECTS TO THE ZONING ORDINANCE, was presented to the City and again a permit was denied; this time because the City contended that plaintiff could build no building of any kind on said lot because the 30-apartment building to the east owned by plaintiffs was nonconforming as to off street parking, at which point on February 7, 1964, this lawsuit was filed. The evidence showed that plaintiffs bought the lot, spent some $1,600.00 in realty taxes and $425.00 for plans and specifications relying on their right to build (Abst. 22).

On June 22, 1964, approximately five months after this lawsuit was filed, the City passed the ordinance (Abst. 26, page 9 hereof) involved in this appeal, which ordinance purported to take away any right plaintiffs had to build on the 20 foot lot involved herein; it is plaintiffs' contention:

1. That the off street parking ordinance of 1952 in no way created any duty on plaintiffs; that while it made plaintiffs' apartment building a legal non-

conforming use it was a use which was a valuable property right in plaintiffs and which the courts will protect;

2. That the "after the fact" ordinance of June 22, 1964, was passed after the filing of this suit, and *after plaintiffs had applied for a permit to build* and doesn't apply to plaintiffs; that if it is felt such ordinance does apply to plaintiffs that such ordinance constitutes the taking of private property with no commensurate benefit to the public and is therefore unconstitutional.

**WHERE FEDERAL QUESTION WAS RAISED.**

As shown by paragraph 12 of the Second Amended Complaint for declaratory judgment (Abst. pg. 6) plaintiffs contend that their property is being taken without due process of law contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States. Such points were, as shown above, raised in the trial court; that such points were also raised in the Illinois Appellate and the Illinois Supreme Courts can be seen from:

Illinois Appellate Court:

Point IV of plaintiffs' brief in the Appellate Court read as follows:

"If it be held that the 'after the fact' ordinance of June 22, 1964, does not apply to plaintiffs, such ordinance is unconstitutional in its application to plaintiffs' property; this is so because a city ordinance compelling the owners of a vacant lot, located in an area with excellent transportation and with ample off street parking facilities, to use it only for off street parking for an adjoining non-conforming apartment building owned by the same owners, constitutes confiscation of private property with no commensurate public gain, . . . . ."

Illinois Supreme Court:

Point IV of plaintiffs' brief in the Illinois Supreme Court reads as follows:

**If it be held that the "after the fact" Ordinance of June 22, 1964, does apply to plaintiffs, such Ordinance is unconstitutional for two reasons:**

**First: It is unconstitutional generally because it is a violation of the Equal Protection Clause and the Due Process Clause of the 14th Amendment to the Federal Contitution for a State or its subsidiary to use a constitutional power to obtain an unconstitutional result.**

*Frost Trucking Co.* v. *Railroad Commission of California,* 271 U.S. 583, 589.

Sect. 26.32 McQuillin's Municipal Corp. (1964 Rev. Ed.).

The *Frost* case holds that a party cannot be required by a governmental entity to give up a legal right he possesses as a condition precedent to being granted a permit, the court saying at page 593:

> "It is not necessary to challenge the proposition that as a general rule, the State, having power to deny a privilege altogether, may grant it upon such condition as it sees fit to impose. BUT the power of the state is that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights."

Clearly since under both the Illinois statutes and the decisions of this Court plaintiffs' right to operate its apartment building as a non conforming use is a property right and since property rights are protected by the above referred to clauses in both the Federal and the State Constitutions, the City cannot require plaintiffs to surrender such property rights as a condition precedent to getting a permit to build on their adjoining twenty foot lot.

Or putting it another way: Sect. 26.32 of McQuillin's The Law of Municipal Corporations (1964 Revised Ed.) says: "The general rule is that a license fee or tax or a charge for a permit must be reasonable in amount and an excessive exaction is void" and Sect. 26.32 says such a license fee cannot be confiscatory. Here the permit charge attempted to be collected by the City of Evanston is clearly confiscatory, as the donation of the whole 20 foot lot to the City would not be enough to make the 30 apartment building comply as to current zoning. The City obviously has no right to exact such a charge if non conforming uses are property rights which the courts will protect!

**Secondly:**

**The Ordinance of June 22, 1964, is also unconstitutional because a City Ordinance compelling the owners of a vacant lot, located in an area with excellent transportation and with ample off street parking facilities, to use it only for off street parking for an adjoining non conforming apartment building owned by the same owners, constitutes confiscation of private property with no commensurate public gain, the evidence showing lack of gain to the public and that the lot is worth $10,000.00 if used for the proposed building and has negligible value if used for off street parking.**

In the instant case the evidence shows that the parcels involved in this appeal are in a commercial area with excellent transportation with ample off street parking available.

Therefore it would be of no public benefit if plaintiffs were required to use their vacant lot to provide off street parking for their apartment building to the east as the evidence shows there is ample off street parking available in the area (Abst. 23)

## REASONS FOR GRANTING THE WRIT.

The total confiscation of plaintiff's property violates the Fifth and the Fourteenth Amendments of the Federal Constitution.

The Illinois Appellate Court has decided an important State question in a way that conflicts with applicable State law.

The Supreme Court of Illinois has consistently held that a non-conforming use in real property is a valuable property right that the courts will protect:

> Section 11-13-1 (4th para.) Chap. 24, Illinois Revised Statutes (1967)
> *Brown* v. *Gerhardt,* 5 Ill. 2d 106
> *Douglas* v. *Melrose Park,* 389 Ill. 98
> *Western Theol. Seminary* v. *Evanston,* 325 Ill. 511
> *Cos Corp.* v. *City of Evanston,* 27 Ill. 2d 570
> *City of Chicago* v. *Ross,* 257 Ill. 76
> Sect. 25.181 McQuillin's Municipal Corp. 1964 Rev. Ed.

nevertheless the decision appealed from takes away plaintiffs' right to continue operating their adjoining apartment building as a non-conforming use in spite of the circumstance that Section 11-13-1 (4th para.) of the Cities & Villages Act of the State of Illinois (Chap. 24) 1967 Illinois Revised Statutes reads as follows:

> "In all ordinances passed under the authority of this article, due allowance shall be made for existing conditions, the conservation of property values, the direction of building development to the best advantage of the entire municipality, and the uses to which the property is devoted at the time of the enactment of such

> an ordinance. The powers conferred by this article shall not be exercised so as to deprive the owner of any existing property of its use or maintenance for the purpose to which it is then lawfully devoted, * * *"

Or as stated by McQuillin (¶25.181, Municipal Corps. 1964 Rev. Ed.)

> "Generally speaking, a use existing at the time a zoning ordinance goes into effect cannot be prohibited or restricted by the ordinance, where it is a lawful use of property, is not a public nuisance, or harmful to the public health, safety, morals or welfare. . . . IF WHEN A ZONING ORDINANCE WAS ADOPTED PREMISES WERE USED FOR A NON-CONFORMING USE, ONE IS WITHIN HIS RIGHTS IN CONTINUING THAT USE. ACCORDINGLY, ZONING REGULATIONS CANNOT BE MADE RETROACTIVE . . . . A zoning ordinance may not operate retroactively to deprive a property owner of his previously vested rights; that is to say, a zoning ordinance cannot deprive the owner of the use to which the property was put before the enactment of the ordinance." (Emphasis added)

The municipal ordinance complained about passed by the defendant city after the filing of this suit provides as follows:

> Section IV, E, Evanston's Ordinance of June 22, 1964.
>
> "Where two or more adjoining lots shown in a plat properly recorded with the office of County Recorder have been held in common ownership at any time subsequent to the effective date of this ordinance and the use of such adjoining lots as a single parcel would meet the requirements of this ordinance, the ownership of said lots shall not be separated nor shall any of the lots be used in any way to conflict with the regulations of this ordinance. No building permits shall be issued for the use of any lot or portion of lot sold, transferred or conveyed in violation of the provisions of this section."

Such an ordinance has been enacted by no other municipality known to plaintiffs; there are no federal or state cases upholding such an ordinance. Plaintiffs stated in their Illinois Supreme Court brief and here repeat that no case is cited by the defendants upholding such a city ordinance and none is cited by the Illinois Appellate Court in its opinion; no one has denied that this is the first attempt by a city to foster such an ordinance on the public; plaintiffs asserted this in their brief filed in the Illinois Appellate Court and defendants at no time have cited any authority upholding such an ordinance or even showing that such an ordinance exists anywhere else.

It is to be noted that the outstanding aspect of the case below is that no defendants' evidence whatsoever was heard, a decree having been entered in favor of defendants at the close of plaintiffs' evidence, a most unusual ruling in a case involving as substantial a question of law as is involved herein. All of the plaintiffs' evidence must therefore be taken in the light most favorable to plaintiffs. Such evidence showed beyond a doubt that plaintiffs' building plan complied with existing municipal ordinances and that a permit should have been granted.

Furthermore the Illinois Appellate Court's opinion is replete with errors; same will not here be pointed out but one dumbfounding error is their following statement on page 8 (App.) "Plaintiffs argue that the enforcement of the ordinance as to the 20 foot parcel will deprive them of a vested right to continue the non-conforming use established as to the apartment building. No facts in the record demonstrate such result." Can a decision based on such reasoning be allowed to stand?

## CONCLUSION.

This case involves a principal of law that is highly important at the moment and will become vastly more important in the future because:

A. Municipalities are continually passing new and different types of zoning ordinances in an attempt to cure urban decline.

B. Each new zoning ordinance leaves vast numbers of existing buildings that do not meet the requirements of the new zoning act. SUCH BUILDINGS THEN BECOME NON-CONFORMING USES.

The question in the instant case is, can a municipality by enacting an ordinance requiring owners of buildings involving non-conforming uses make such owners use adjoining property they have later acquired to lessen the non-conformance of their non-conforming buildings? Non-conforming uses have consistently been held to be a property right which the courts will protect.

For the above and foregoing reasons, a Writ of Certiorari ought to be issued to review the decision of the Illinois Appellate Court (First District).

Respectfully submitted,

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## APPENDIX I

### OPINION OF THE APPELLATE COURT OF ILLINOIS (FIRST DISTRICT)

TRAPP, J.

Plaintiffs appeal from the order of the trial court which dismissed an action for a declaratory judgment, entering judgment in favor of the defendants, and against the plaintiffs. The complaint prayed that defendants be directed to issue a building permit, that the mandatory zoning ordinance of the City of Evanston be held inapplicable to plaintiffs' property, and that said City be restrained form enforcing such ordinance as to plaintiffs' premises.

It is alleged that plaintiffs, as trustees, acquired title to a parcel described as the East 20 feet of Lot 14 in Block 37 in a specified sub-division of blocks in 1949. The parcel has a frontage on Central Street in Evanston of approximately 20 feet and an approximate depth of 155 feet. It is further alleged that such parcel is unimproved "and is not used for any purpose whatsoever", and that such parcel adjoins Lots 12 and 13 upon which is built an apartment building with 30 apartment units acquired by the plaintiff trustees in 1942.

The answer denies that the described 20 foot parcel is unused and alleges that it was, in fact, used as accessory to the apartment building. There is a denial that the parcel was acquired by the trustees separately from the apartment building in 1949. Nothing in the pleading or the record clarifies such issue as the stipulation in the record only states that "it appears" that title to the respective parcels was acquired on the respective dates.

An issue is whether or not the two described parcels are separate in development of title and unrelated in use, and continued to be so disparate at the time of disposition in the trial court.

Plaintiffs allege that the City of Evanston first adopted an off-street parking ordinance applicable to the apartment building, then zoned commercial, in 1952. It is argued that such apartment building, at that time, became a non-conforming use.

It is alleged that on March 15, 1963, plaintiffs applied for a building permit to construct a two-story office and apartment building; that objections were made to the plans submitted, but the revised plans and application were denied in 1963 because of inadequate off-street parking provisions. Plaintiffs then filed for a variation before the Zoning Board of Appeals. Such application was denied in October, 1963, because of the non-conforming provisions for parking on the 20 foot parcel, and because of accessory use of such parcel with the apartment building.

It is alleged that, thereafter in April, 1965, plaintiffs again submitted plans for a generally similar building on the 20 foot parcel with an application for a building permit, but that such was refused "in spite of the circumstances that such plans conformed in all respects with the zoning ordinances".

The complaint alleges that in June, 1964, the zoning ordinance of Evanston was amended to provide:

> "Where two or more adjoining lots shown in a plat properly recorded with the office of County Recorder have been held in common ownership at any time subsequent to the effective date of this ordinance and use of such adjoining lots as a single parcel would meet

> the requirements of this ordinance, the ownership of said lots shall not be separated nor shall any of the lots be used in any way to conflict with the regulations of this ordinance. No building permits shall be issued for the use of any lot or portion of lot sold, transferred or conveyed in violation of the provisions of this section."

It is the apparent theory of the argument and the pleadings that plaintiffs acquired a right to a building permit upon the 20 foot parcel at the time of the application in 1963, but that the ordinance as amended in 1964 was employed to "tack" or attach the 20 foot parcel to the apartment building for zoning purposes as an "after the fact" amendment with the result that (1) the 20 foot parcel is taken without just compensation or due process when the public welfare did not require such restriction on plaintiffs' use of the land, and (2) the plaintiffs are injured in that a right in a non-conforming use of the apartment building was lessened, or reduced in scope.

Defendants' answer alleges multiple affirmative defenses including: that an ordinance adopted in 1940, which required parking spaces on the premises or adjoining property, was effective to control both the apartment building and the parcel when plaintiffs acquired such property in 1942 and 1949; that an ordinance adopted in 1960 provided:

> "Parking spaces accessory to buildings and uses which exist on the effective date of this ordinance shall not be reduced to less than the number required under this Section X for buildings hereafter erected.",

and that the 20 foot parcel had been used since purchase as an accessory use including off-street parking to the apartment building on Lots 12 and 13.

Such answer further alleges that the zoning ordinance as amended in 1963 provided in §42-108 that no building permit should issue unless an approved recorded plat of the area was submitted with the application for the permit, and that no such instrument had been submitted. A plat identified as Plaintiffs' Exhibit No. 6, contained in the supplemental abstract, shows neither approval nor recording on its face, and there is nothing in the record upon the issue.

As a further affirmative defense, it is alleged that under an ordinance effective in 1960 the apartment building on Lots 12 and 13 became non-conforming in the required lot area for such number of dwelling units, and as to the area for each dwelling unit. Defendants deny that the plaintiffs acquired a right to build on the 20 foot parcel prior to the amendment of 1964, relating to "common ownership".

The reply filed by plaintiffs admits that the 20 foot parcel is used for drying laundry and the parking of automobiles, albeit characterized as occasional and random; it denies that §42-108 of the ordinance (requiring an approved recorded plat to be on file before a building permit is issued) is germane, as the conveyance of the 20 foot parcel did not involve a subdivision. There is no reply to the affirmative defenses relating to the amendment of 1960 prohibiting the reduction of accessory parking spaces, and no reply to the allegations of the answer as to the nonconforming use of the apartment as to area.

This appeal is considered in the light of the nature of proceedings for declaratory judgment. The award or denial of relief, even where the controversy or some part of it will be settled, is discretionary with the court. Chap. 110, §57.1 and Comment to Sub-section (1), Smith-Hurd

Annotated Statutes. *State Farm Mut. Automobile Ins. Co.* v. *Morris,* 29 Ill. App.2d 451; 173 N.E.2d 590. That opinion holds that dismissal of the action is an appropriate judicial method of declining to grant relief; that procedure in declaratory judgment provides cumulative and additional remedies, but it neither provides a substitute for existing remedies nor creates new substantive rights. *Interlake Iron Corp.* v. *Dravo Corp.,* 68 Ill. App.2d 167; 215 N.E.2d 137. The court's discretion is as to whether to enter or to decline to enter judgment. *State Farm Mut. Automobile Ins. Co.* v. *Morris,* and the issue upon appeal is whether there was such an abuse of discretion by the trial court as to require a reviewing court to intervene. *Interlake Iron Corp.* v. *Dravo Corp.*

Nothing in the record discloses what was passed upon by the trial court in the disposition of the several affirmative defenses. From the record presented we conclude that the trial court could very well have determined that the apartment building was non-conforming as to off-street parking under the ordinance of 1940; that the ordinance of 1960, prohibiting the reduction of accessory parking space, was applicable and authorized denial of a building permit. Again, the court could have determined that there had been a failure to comply with the requirement of filing an approved reported plat as precedent to a building permit. Since such issues have not been brought into a focus in this record, extended examination of the application of the several ordinances would become a tedious *tour de force.* From our examination it appears that there would be no abuse of discretion in finding one or more of such ordinances controlling.

The argument that the "common ownership" amendment of 1964 was used as an "after the fact" ordinance to deny the building permit is not supported in the record.

The issue presented in the trial court arises upon the application of April, 1965, for a building permit on the 20 foot parcel. This record shows nothing as to the reason that such permit was refused. The allegation that there was compliance "in all respects" with the zoning ordinances is a conclusion which does not permit judgment by this court. It is argued that issues on such denial were framed in a mandamus proceeding which was dismissed, but our record is barren. Whether the trial court considered them cannot be ascertained.

Even if we assume that such permit was denied solely because of the "common ownership" amendment of 1964, it cannot logically be said that there was use of an "after the fact" ordinance to deny a permit sought in 1965.

Plaintiffs' thesis that the alleged use of the "common ownership" ordinance results in a taking of the 20 foot parcel without compensation or due process fails to come within the rule in this State, i.e., a party does not acquire a right to use premises free and clear of subsequent changes in zoning provisions unless the evidence shows a substantial change in position made in good faith through expenditures, or obligations incurred in reliance upon the probability that the required building permit would be issued. Opinions establishing such standard are collected in *People Ex Rel. Nat. Bank* v. *Cook County,* 56 Ill. App.2d 436; 206 N.E.2d 441.

Plaintiffs' evidence directed to this issue is not impressive. The record discloses no more than an assertion that the purchase of the 20 foot parcel in 1949 was for building purposes. Plaintiff trustees testified that there had been no request for a permit from 1949 until 1963. The purpose to build lay aborning for some 14 years. The fact that the tax authorities assessed the 20 foot parcel

separately from the apartment building is scant evidence of actual or intended use. Payment of taxes is an incident to the ownership of real estate which we will not accept as evidence of a change in position in reliance upon an existing zoning ordinance.

The only expenditure of record which might qualify is the sum of $200.00 for plans for construction on the 20 foot parcel, dated on May 27, 1963. The further expenditure of $225.00 for plans of a similar nature was made as of December 20, 1965, after the petition for zoning variation on the 20 foot parcel had been denied, and after the passage of the ordinance of 1964, which is attacked. There is great doubt that it can properly be said that the latter payment was made in reliance upon a right to build on the parcel.

The evidence in this case relevant to incurring detriment in good faith reliance upon existing ordinances is in no way comparable in degree to such evidence in the authorities cited, and relied upon by plaintiffs. In each it is noted that prompt, if not immediate action, was taken to develop the property acquired.

In *Western Theol. Seminary* v. *Evanston,* 325 Ill. 511; 156 N.E. 778, which plaintiffs quote at length, the Seminary had purchased or leased large amounts of land, meanwhile selling the property formerly held by it for school purposes. The land at issue there was worth $150,000 and there were preparations to erect a building at a cost of $750,000. After such steps were taken there was an attempt to amend the ordinance in a manner that would exclude the Seminary. It was held to be unreasonable and arbitrary to exclude the Seminary after the funds had been invested. In *Cos Corp.* v. *City of Evanston,* 27 Ill.2d 570; 190 N.E.2d 364, land costing $47,000 and other prop-

erty costing $189,000 was procured, with further expenditures in architect fees and expenses. Such was held to be a substantial change. Similar factors controlled the result in *Fifteen Fifty State St.* v. *Chicago,* 15 Ill.2d 408; 155 N.E.2d 97; *Nott* v. *Wolff,* 18 Ill.2d 362; 163 N.E.2d 809; *The People Ex Rel.* v. *Morton Grove,* 16 Ill.2d 183; 157 N.E.2d 33; *The People Ex Rel. Nat. Bank* v. *Cook County,* 56 Ill. App.2d 436; 206 N.E.2d 441 and *Sgro* v. *Howarth,* 54 Ill. App.2d 1; 203 N.E.2d 173.

This division sitting in its own district held that there was no substantial change in position in spending $325.00 for a plat plan, $400.00 in office help and $200.00 for telephone calls. *Naumovich* v. *Howarth,* ..... Ill. App.2d .....; 234 N.E.2d 185. See also *The People Ex Rel. Nat. Bank* v. *Cook County,* 56 Ill. App.2d 436; 206 N.E.2d 441.

The Supreme Court has stated that each case actually must be decided upon its own merits and that the burden is on the party attacking the ordinance to establish the invalidity thereof. *The County of Lake* v. *MacNeal,* 24 Ill.2d 253; 181 N.E.2d 85.

Plaintiffs argue that the enforcement of the ordinance as to the 20 foot parcel will deprive them of a vested right to continue the non-conforming use established as to the apartment building. No facts in the record demonstrate such result. In the cases cited by plaintiffs the use of the immediate property to which the non-conforming use was attached was affected. There is reliance primarily upon *Village of Skokie* v. *Almendinger,* 5 Ill. App.2d 522; 126 N.E.2d 421. The primary issue there decided is that title is not essential to determining the existence of a non-conforming use of land. In the aspect that the case holds that there was an unreasonable taking of a non-conforming use, the land to which said non-conforming use attached

was directly affected in that its use was substantially destroyed. Here, there is no evidence that the use of the apartment building will be altered or reduced. See also *People* v. *Ferris,* 18 Ill. App. 2d 346; 152 N.E.2d 183. The issues decided in the cited *Douglas* v. *Village of Melrose Park,* 389 Ill. 98; 58 N.E.2d 864, and *Brown* v. *Gerhardt,* 5 Ill.2d 106; 125 N.E.2d 53, were whether or not there had been abandonment of non-conforming uses.

Plaintiffs argue that enforcement of the ordinance is arbitrary, unreasonable and without necessity in public welfare or safety from testimony that there are areas of off-street parking at distances from one-half block to three blocks from the real estate in question. Such facilities include a parking area for the Athletic Department of Northwestern University; and an area adjacent to a railroad. They are not only relatively remote in distance, but no right to the use of such areas by tenants of plaintiffs is established. The ordinance of 1960 in effect at the time of the application for the first building permit required ownership or contracual arrangement for a use of parking spaces to be secured and continuously maintained for the life of the building. The testimony is, at best, vague and speculative. If the reasonableness of the ordinance is fairly debatable, the courts will not intervene. *The County of Lake* v. *MacNeal,* 24 Ill.2d 253; 181 N.E.2d 85.

The trial court refused to admit plaintiffs' proferred testimony, apparently purporting to be of an expert quality, to the effect that persons using the apartment units did not own, or use, many automobiles. Such testimony is not of a stature to overcome, in this Court, the legislative judgment expressed in the several ordinances pleaded.

Finding no abuse of discretion in the court below, its judgment is affirmed.

AFFIRMED.

SMITH, P. J. and CRAVEN, J. CONCUR.

## APPENDIX II

### Opinion of Evanston Zoning Board

Before The Zoning Board of Appeals on September 17, 1963.

The appeal of August Hoerdt for Variation From Off-Street Parking Regulations at 1711 Central Street.

To: The Honorable Mayor and The City Council, Evanston, Illinois.

The appeal of August Hoerdt for a variation from the off-street parking regulations of the Zoning Ordinance, to permit the construction of a 2-story building, containing five 1-room dwelling units, with store and office space on the first floor, at 1711 Central Street, was considered at a public hearing conducted by the Zoning Board of Appeals in the Council Chamber at the Municipal Building, Evanston, Illinois, beginning at eight o'clock on Tuesday evening, September 17, 1963. Notice of the date, place, and purpose of the hearing was published in The Evanston Review on Thursday, August 29, 1963, and a copy of such notice was sent to each of the twenty-two property owners nearest the location in question.

APPELLANT'S STATEMENT

Mr. Ross Welch, attorney, represented Mr. August Hoerdt, stating that Mr. Hoerdt is the owner of a 20-foot lot located at 1711 Central Street which is zoned as a B-2 Business District. He explained plans for the proposed store and office on the first floor with five 1-room apartments on the second floor. Mr. Welch said that the five off-street parking spaces required could be provided if permission were given to change the required 45° angle to a 52° angle, and to have the stall width parallel to the

aisle 10'9" instead of 12', and the stall depth perpendicular to the aisle 18' instead of the required 18'9". He also said the owner of the building to the east has granted a permanent 9-foot easement for access to the parking area. Mr. Welch said that most tenants of 1-room apartments would not have cars and that this location is within easy walking distance of public transportation facilities.

OBJECTORS' STATEMENT

There were no objectors present at the public hearing nor were any objections in writing received at the office of the Director of Building and Zoning.

FINDINGS OF THE BOARD

The Board finds the subject property consisting of a lot 20' x 155' is not adequate to provide the required off-street parking for the proposed store, office, and apartment building, especially in view of the fact that access to the parking space would necessarily be over an easement from the owner of adjoining property to the east. Further, the Board finds the property could not be used for the proposed development without such an easement, and that the subject lot is presently being used as an accessory use to the non-conforming apartment building to the east, including off-street parking.

RECOMMENDATION

It is, therefore, the recommendation of the Zoning Board of Appeals that the appeal of August Hoerdt for a variation from the off-street parking regulations of the Zoning Ordinance, to permit the construction of a 2-story building, containing five 1-room dwelling units, with store and office space on the first floor, at 1711 Central Street, be denied.

Chairman Zoning Board of Appeals